IN THE

Supreme Court of the United States

OCTOBER TERM 1940.

WEST SIDE TENNIS CLUB, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

LAWRENCE A. BAKER,
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CONTENTS.

CITATIONS.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The undersigned, on behalf of the above-named petitioner, prays that a writ of certiorari issue to review the judgment (R. p. 110) of the United States Circuit Court of Appeals for the Second Circuit, entered May 1, 1940, affirming the decision of the United States Board of Tax Appeals (R. p. 91) entered January 21, 1939.

THE OPINIONS BELOW.

The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. pp. 106-110) was promulgated April 15, 1940 and is reported in 111 Fed. (2d) 6. The findings of fact and opinion of the United States Board of Tax Appeals were promulgated January 20, 1939 (R. p. 72-90) and are reported in 39 B. T. A. 149. (R. pp. 72-91.)

JURISDICTION.

The judgment of the United States Circuit Court of Appeals sought to be reviewed was entered on May 1, 1940. Jurisdiction to issue the writ requested is found in the provisions of Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. (U. S. C. A. Title 28, Sec. 347-350.)

STATUTES AND REGULATIONS INVOLVED.

Section 103(9) of the Revenue Act of 1932 and Section 101(9) of the Revenue Act of 1934 provide:

> "The following organizations shall be exempt from taxation under this title—
> "Clubs organized and operated exclusively for pleasure, recreation, and other non-profitable purposes, no part of the net earnings of which inures to the benefit of any private shareholder."

Article 530, Regulations 77 (interpreting the 1932 Act) reads as follows:

> "The exemption granted by section 103(9) applies to practically all social and recreation clubs which are supported by membership fees, dues, and assessments. If a club, by reason of the comprehensive powers granted in its charter, engages in traffic, in agriculture or horticulture, or in the sale of real estate, timber, etc., for profit, such club is not organized and operated exclusively for pleasure, recreation, or social purposes, and any profit realized from such activities is subject to tax."

Article 101(9)-1 of Regulations 86 (interpreting the 1934 Act) contains the same language as Article 530, Regulations 77, with the addition:

> "If a club otherwise exempt, sells any of its property at a profit, it is not exempt for the taxable year for which the profit is taxable."

While they are not directly involved, the Revenue Acts of 1913, 1916, 1918 and 1921 contained provisions granting exemption from tax on corporations to, "Clubs organized and operated exclusively for pleasure, recreation and other non-profitable purposes, no part of the net earnings of which inures to the benefit of any private stockholder *or member.*" (Italics ours) It is significant that the italicized words are omitted from the acts here under consideration.

The above quotation of Article 530, Regulations 77, appears in identical language in Regulations 45, 62, 65, 69 and 74 (interpreting the Acts of 1918, 1921, 1924, 1926 and 1928.)

The Commissioner has modified his interpretation of that part of the statutes dealing with exemptions for clubs by issuance of Treasury Decision 4760 (Cumulative Bulletin 1937-2 p. 128) which reads as follows:

> "Article 101 (9)-1 of Regulations 86 and Article 101(9)-1 of Regulations 94 are amended to read:
>
> "Art. 101(9)-1. *Social clubs.*—The exemption granted by section 101(9) applies to practically all social and recreation clubs which are supported by membership fees, dues, and assessments. If a club engages in traffic, in agriculture or horticulture, or in the sale of real estate, timber, etc., for profit, such club is not organized and operated exclusively for pleasure, recreation, or social purposes. Generally, an incidental sale of property will not deprive the club of the exemption."

QUESTIONS PRESENTED.

I.

Was petitioner during the years 1933 and 1934 a "Club" —"operated exclusively for pleasure, recreation, and other non-profitable purposes, no part of the net earnings of which inured to the benefit of any private shareholder", and therefore exempt from Federal income and profits taxes? Respondent, the Circuit Court and the Board agree

that it was "organized" for the exempt purposes. They hold, however, that even though since organization its charter powers have never been broadened and its fundamental activities have not changed, it is not operated exclusively for exempt purposes because it derives profits from sources other than contributions in the form of initiation fees and dues from its members. Furthermore, even though petitioner has never issued certificates of stock in any form nor distributed any of its funds to its members, the opinions below hold that the members indirectly benefit from petitioner's earnings on the ground that if they were absent the members might have to pay higher dues.

II.

If petitioner is not entitled to exemption: (a) Are the initiation fees and dues received from its members taxable income; (b) Is petitioner liable for penalties for 1933 and 1934 for failing to file returns at the times prescribed by the statutes for corporations admittedly taxable?

STATEMENT.

Petitioner was incorporated in 1902 under the Membership Corporation Law of New York "to provide and maintain lawn tennis courts and the buildings and accommodations appertaining thereto, for the use of its members, and to promote social intercourse among the members thereof." Its charter powers have never been changed. It has never issued bonds or certificates of stock of any kind and all funds received from all sources have been used to pay its maintenance expenses and debts. (Board's Findings, R. p. 73, 74.)

Petitioner had 790 members in 1933 and 751 members in 1934. All of its members were elected in accordance with its constitution and by-laws. Excepting honorary members, all paid initiation fees and each paid annual dues ranging from $20.00 to $65.00 in accordance with privilege classifications. (Board's Findings R. p. 79.) Petitioner received

fees and dues from its members in 1933 and 1934 in the sums of $44,790.00 and $42,042.75. (Ex. H, R. p. 44; Ex. I, R. p. 53.)

To carry out its charter obligations petitioner owns and maintains at Forest Hills, Long Island, for the benefit of its members and their guests, a club house with the usual recreation, dining, locker and shower rooms, twenty-eight grass tennis courts, thirty-two clay tennis courts and five fast drying tennis courts. (Board's Findings, R. p. 78.)

Petitioner's only activity other than the maintenance of its facilities for its members has been to conduct in a stadium owned by it and occupying less than one-fourth of the total area of its property, national amateur tennis tournaments and international amateur tennis matches under the auspices and with the permission of the United States Lawn Tennis Association which has been the national governing body for amateur tennis since 1881. The Association is composed of recognized tennis clubs and associations.

These matches consume a maximum of three weeks annually.

The opinions below rest on the conclusion that the conduct of such matches destroys petitioner's right to exemption. They held petitioner was not operated exclusively for the exempt purposes because the public were permitted to view the matches on payment of an admission charge. We therefore deem it necessary to elaborate on the history of petitioner's activities with respect to such matches. (Board's Findings, R. p. 73-79.)

Beginning in 1914 petitioner received from the United States Lawn Tennis Association permission to hold some of the tournaments and matches under its control and because it did not have a stadium it was necessary to hold them on turf in front of the club house; to accommodate spectators it was necessary to erect temporary stands which injured the grounds and interfered with the normal activities of the club for about three months in each year. This condition lasted until 1922.

The Association desired a permanent stadium at a recognized tennis club in which some of the important matches might be held; petitioner desired to cooperate with the Association and to continue to hold some of such matches on its property. Petitioner and the Association entered into an agreement in 1923, pursuant to which petitioner erected a stadium at a cost of $269,000.00, a large part of which was borrowed, and the Association gave petitioner permission to hold certain of the tournaments and matches in the stadium for a period of ten years. To enable petitioner to recoup the cost of the stadium, the Association granted it the right to retain a percentage of the proceeds received from the sale of tickets to spectators. Prior to expiration of the 1923 agreement a similar new agreement was executed for a further period of ten years which will expire in 1944. This was necessary to enable petitioner to pay off the balance of the cost of the stadium, the matches already held having provided insufficient funds for that purpose.

As of December 31, 1934 petitioner was indebted to the Association for $24,800.00 on account of loans received from it; it was indebted on the bond and mortgage executed when the stadium was built in the sum of $70,000.00; and it carried as a deferred liability for advance seat subscriptions the sum of $28,160.00. Its quick liquid assets amounted to $28,862.67. (See Balance Sheet, R. p. 54.)

It is not feasible for the national amateur tournaments and international amateur matches to be held at a ball park or a stadium as maintained for athletics by the colleges. The Association has never permitted such matches to be held on property other than that owned by one of its member clubs.

Petitioner has never used the stadium for other than tennis or club purposes except on three occasions.

The Commissioner of Internal Revenue was actively considering petitioner's right to exemption from a date prior to June 1934 until July 1935. Prior thereto petitioner's officers and directors believed it to be exempt. Almost

immediately after notification of a final ruling that it was not exempt petitioner filed with the Collector of Internal Revenue returns for 1933 and 1934 disclosing all of its receipts and disbursements but claiming exemption. (See Returns, Ex. H and I, with supporting papers, R. p. 48-60.)

Petitioner has always collected from purchasers of tickets for matches held in the stadium and from its members, the required taxes on admission tickets, initiation fees and dues and transmitted such taxes to the Collector of Internal Revenue. (See Board's Findings R. p. 82.)

SPECIFICATIONS OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

(1) In affirming the decision of the United States Board of Tax Appeals that petitioner is not exempt.

(2) In holding petitioner liable for taxes for the years 1933 and 1934, contrary to the provisions of Section 103(9) of the Revenue Act of 1932 and Section 101(9) of the Revenue Act of 1934.

(3) In holding that initiation fees and dues collected by petitioner from its members are taxable income.

(4) In holding that petitioner is liable for penalties for failure to file returns for 1933 and 1934 on the dates generally prescribed in the Revenue Acts of 1932 and 1934 for corporations admittedly liable for tax.

REASONS FOR GRANTING THE WRIT.

The opinion of the Second Circuit is directly contrary to the opinion of this Court in *Trinidad, Insular, Collector* v. *Sagrada Orden de Predicatores, etc.* (263 U. S. 578, 44 S. Ct. 204) which held that in considering exemption of a corporation:

> p. 581. "First, it" (the 1913 Revenue Act) "recognizes that a corporation may be organized and operated exclusively for religious, charitable, scientific

> or educational purposes and yet have a net income. Next, it says *nothing about the source* of the income, but makes the *destination* the ultimate test of exemption."

In discussing that corporation's use of its properties to produce income this Court said:

> p. 581. "Making such properties productive to the end that the income may be thus used does not *alter or enlarge the purposes* for which the corporation is created and conducted."

By contrast the Second Circuit held in this case:

> p. 8. "In the case at bar a large business bringing in a net operating income of more than half the gross income derived from the dues and ordinary activities of the club precludes an exemption of the taxpayer as a club operated exclusively for pleasure, recreation and other non-profitable purposes. The members may have enjoyed the prestige which came to their club from the annual matches, yet these matches to some extent interfered with their club privileges and were in the main simply a means of carrying the expenses of the club by means of profits obtained from the public." (R. p. 109)

It is therefore apparent that the Circuit Court interprets the statutes as depriving a club of exemption merely because of the receipt of income from sources other than the members, even though the statutes themselves provide that a club may have "earnings", which certainly does not include dues and initiation fees, and still be exempt.

Although the Circuit Court and the Board could not and did not find that any of the funds received by petitioner were *paid* by it to its *members,* they both held that the members benefited from the profits of the tournaments and matches for otherwise, "they would have had to pay larger dues or restrict club operations uncomfortably unless profits had been realized by the club from outsiders who were

willing to purchase tickets for the great annual tennis matches." (111 Fed. (2d) 6, 8; R. p. 109)

Aside from the fact the statutes do not use the word "member" but "private shareholder" the conclusion that a possible reduction in dues is the benefit contemplated by the statutes is contrary to the only cases involving the question, namely, *King County Insurance Co.* v. *Commissioner*, 37 B. T. A. 288 and *Oregon Casualty Association* v. *Commissioner*, 37 B. T. A. 340. If such conclusion were carried to its logical end, any club that might be fortunate enough to have income from invested funds or any source other than dues and initiation fees, would thereby lose its right to exemption. However, the statutes obviously contemplate receipt of earnings from some kind of financially profitable activities, otherwise it would not condition the exemption *on the use* to which such income or earnings might be devoted.

We have shown that in *Trinidad* v. *Sagrada Orden*, 263 U. S. 578, the Court said that the act "recognizes that a corporation may be organized and operated exclusively for religious, charitable, scientific or educational purposes and yet have a net income." We may paraphrase this language to apply to the present act affecting clubs as follows: The act "recognizes that a club may be organized and operated exclusively for pleasure, recreation and other nonprofitable purposes and yet have net earnings." This paraphrasing, we submit, is entirely justified because the acts are practically identical in language except that one refers to clubs and the other to religious corporations, and one uses the word "earnings" instead of the word "income."

This being the case, an entirely paradoxical situation is presented in the opinion of the Circuit Court of Appeals. It holds that because the earnings from the National tennis matches were a means of carrying the expenses of the club, the club thereby loses its exemption. But the statute, as we have shown, recognizes that a club may have earnings and still retain its exemption. If, however, a club cannot

retain its exemption if it applies these earnings to club purposes, thereby reducing members' dues, what must it do with the earnings in order to retain the exemption? To this query, we know no answer.

II.

The opinion of the Second Circuit is directly in conflict with the opinion of the Fifth Circuit in *Koon Kreek Klub* v. *Thomas, Collector* (December 28, 1939), 108 Fed. (2d) 616. Although organized in 1902 as a fishing and hunting club, Koon Kreek amended its charter to include "the raising of such livestock for profit only as the preserves of such club will maintain." This resulted from a desire to grant grazing privileges over its land for $600 per year. In 1934 oil was discovered near the club property and the club granted an oil lease at $4.00 per acre on its 6,777 acres (over $27,000) with an annual renewal rental of $1.00 per acre, ($6,777), reserving the usual royalties. The amount received from the lease was used to reduce or retire a mortgage against the club property. On this state of facts and notwithstanding respondent's regulations, the Fifth Circuit held that the club had not departed from its fundamental purposes and (p. 617) "whatever financial gain was realized was incident to and directed toward the accomplishment of the purposes upon which the exemption is based."

In the case under review the Second Circuit interprets the *Koon Kreek* opinion as holding that the amount of earnings realized from sources other than the members controls the right to exemption. That this is not so is apparent from the *Koon Kreek* opinion:

> p. 618. "The contention that the club did not operate exclusively for non-profitable purposes because of the leases of grazing rights is equally without foundation. In order to maintain its houses and preserves, it was required to raise funds from some source. That these funds might be derived from a use of the prop-

erties themselves, not inconsistent with the purposes for which they were maintained, would not change the nature of the operation any more than an increase in dues charged to members. Indeed, if the club could be made self sustaining by grazing fees, guest fees, and other perquisites, its operations being for the stated purposes, its exempt status would not be affected. We need but to extend this principle to the acquisition of the preserves themselves to demonstrate that the granting of oil leases to obtain money with which to pay the mortgage debt did not change the character of the organization."

In the case under review the Second Circuit narrowly restricts the principle established by this court in the *Trinidad* case, *supra,* to public and charitable corporations. However, the Fifth Circuit in the *Koon Kreek* case finds this unjustified and concludes that the *Trinidad* case held as we contend:

p. 618. "* * * the statute says nothing about the source of the income, but makes its destination the ultimate test of exemption."

Comparing the statutory provisions granting exemption to clubs and to charitable corporations, the Fifth Circuit continues:

p. 619. "The necessity of having money to carry on the enterprise, whether charitable or recreational, is present in both cases. Deriving funds from the properties owned to further either of these ends would be no more a departure in one case than in the other."

With regard to the contention that the earnings from the Championship matches inure to the benefit of the members because otherwise they would have to pay higher dues, the Circuit Court of Appeals, in the *Koon Kreek Klub* case had this to say:

p. 618. "This brings us to appellee's third contention, that the reduction in liabilities necessarily

resulted in a reduction in dues and assessments, or liability therefor, and therefore resulted in a benefit to the shareholders. Viewed in the light of the statute, this contention refutes itself. The obvious answer is that the exemption applies to profits so long as they are retained by the organization or used to further the purposes which are made the basis of the exemption, and are not otherwise used for the benefit of any private shareholder. The authorities relied upon by appellee on this point (5) like those cited in Note 4, supra, are cases which the original purpose of the organization was to render a service of value or benefit, not within the exemption allowed by the statute."

III.

We believe this Court must be aware of the fact that countless golf and tennis clubs throughout the country make their facilities available from time to time for tournaments, professional and amateur, which the public is permitted to attend on paying of an admission fee. Each year the United States Lawn Tennis Association permits clubs other than petitioner to hold matches and tournaments under its control on their properties. Several hundred of such tournaments and matches are held yearly.

Apart from the conflict caused by the Second Circuit, we believe this case presents a question of general importance which should be decided by this Court to enable the respondent to determine the tax situation of all clubs on a consistent basis. That is not possible in view of the opinion below in this case.

IV.

The status of initiation fees and dues paid by members to social clubs is a question of general importance to all such clubs which may be held subject to Federal taxes. It is a question which has never been directly decided although we believe it has been indirectly decided in petitioner's favor in analagous situations. (See *Valley Waste Disposal Co.* v. *Commissioner,* 38 B. T. A. 452; *Board of Fire Underwriters, etc.* v. *Commissioner,* 26 B. T. A. 860.)

We contended below that club initiation fees being non-recurring and paid but once for the privilege of membership are capital contributions.

We contended below that club dues are not taxable income because not "derived from capital, from labor or from both combined." Furthermore, they cannot be called profits as that term is generally understood, as the sole use petitioner can put them to is its maintenance and the payment of its debts. Practically, they represent nothing more than payment by each member of his proportionate share of his club's expense.

The Circuit Court does not answer either contention but decides the question solely on the fact that petitioner included the fees and dues in its income tax returns and used them to pay operating expenses. *Book entries cannot control* the status of receipts as income. Inclusion of the fees and dues in the returns was necessary for a full and honest disclosure of all of petitioner's receipts. The returns were filed with insistence upon exempt status.

V.

Although the Circuit Court fails to mention the decision in discussing the question, we believe the opinion below to be in direct conflict with the prior opinion of the Second Circuit in *Jockey Club* v. *Helvering*, 76 Fed. (2d) 597, 30 B. T. A. 670, on the question of petitioner's liability for penalties.

Respectfully submitted,

LAWRENCE A. BAKER,
Attorney for Petitioner.

INDEX

CITATIONS

254484—40

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 292

WEST SIDE TENNIS CLUB, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 72–90) is reported at 39 B. T. A. 149. The opinion of the Circuit Court of Appeals (R. 106–110) is reported at 111 F. (2d) 6.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 1, 1940 (R. 110–111). The petition for a writ of certiorari was filed July 31, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the petitioner was a club "operated exclusively for pleasure, recreation, and other nonprofitable purposes, no part of the net earnings of which inures to the benefit of any private shareholder" so as to be entitled under the statute to exemption from taxation on its income.

2. Whether the petitioner was subject to a 25 per cent penalty imposed by the statute for the late filing of a return without reasonable cause.

STATUTES INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 103. EXEMPTIONS FROM TAX ON CORPORATIONS.
>
> The following organizations shall be exempt from taxation under this title—
>
> * * * * *
>
> (9) Clubs organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes, no part of the net earnings of which inures to the benefit of any private shareholder;
>
> * * * * *
>
> SEC. 291. FAILURE TO FILE RETURN.
>
> In case of any failure to make and file a return required by this title, within the time prescribed by law or prescribed by the Commissioner in pursuance of law, 25 per centum of the tax shall be added to the tax, except that when a return is filed after such time and it is shown that the failure to file it was due to reasonable cause and not due to will-

> ful neglect no such addition shall be made to the tax. The amount so added to any tax shall be collected at the same time and in the same manner and as a part of the tax unless the tax has been paid before the discovery of the neglect, in which case the amount so added shall be collected in the same manner as the tax. The amount added to the tax under this section shall be in lieu of the 25 per centum addition to the tax provided in section 3176 of the Revised Statutes, as amended.

Sections 101 (9) and 291 of the Revenue Act of 1934, c. 277, 48 Stat. 680 (U. S. C., Title 26, Secs. 103 and 291, respectively), are substantially identical with the above sections of the Revenue Act of 1932.

STATEMENT

The facts, as found by the Board of Tax Appeals (R. 73–83), may be summarized as follows:

The petitioner was incorporated in 1902 under the Membership Corporation Law of New York "to provide and maintain Lawn Tennis Courts and the buildings and accommodations appertaining thereto, for the use of its members, and to promote social intercourse among the members". (R. 74.) It has never issued bonds or certificates of stock. Its members, who have always been admitted through election and payment of initiation fees and dues, totalled 790 and 751, respectively, during the taxable years 1933 and 1934, and assisted, without compensation, in running its affairs. All of its in-

come has always been used exclusively for the payment of its operation expenses and debts. (R. 73–74, 78, 79, 82.)

In addition to facilities maintained for members, consisting of tennis courts and a clubhouse with usual recreational, dining, locker and shower rooms, the petitioner owned and operated, on its property at Forest Hills, a stadium with a seating capacity of about 13,000, for the purpose of holding major national or international championship tennis matches or tournaments, to which the general public was admitted upon payment of admission fees, which ranged from $1.50 to $5.50 for single tickets and from $6.60 to $15 for series tickets. Members were required to pay the same prices as nonmembers for tickets to these major tournaments. (R. 78–79, 81–82.)

These tournaments, held under the auspices of the United States Lawn Tennis Association, have been (by designation by the Association) played on the petitioner's property since 1914; until 1922 temporary stands were erected for the accommodation of the public to witness them. Because of the inconvenience caused to petitioner and its members by the repeated erection of temporary stands, and because of the desire of the Association to obtain a permanent stadium for these events, the stadium was built by petitioner in 1923 at a cost of $269,000 (partly borrowed), in keeping with an agreement with the Association awarding certain

major tournaments to petitioner for 10 years (and, later, for another 10 years, until 1943), upon an agreed division of the net proceeds of the events (R. 74–78.)

At the end of 1933 and 1934, the petitioner, although still owing substantial sums to the Association for loans and on a mortgage made in connection with the erection of the stadium, had surpluses of $225,720.83 and $219,140.74, respectively, after depreciation. (R. 64, 67, 79.)

The petitioner has always collected and transmitted to the Collector of Internal Revenue the required tax on initiation fees, dues, and tickets for the competitions held on its property. Prior to 1934 the officers and directors of petitioner believed that it was exempt from federal income taxes. Upon being notified by the Commissioner that he considered it liable for taxes, petitioner caused to be prepared, and on August 2, 1935, filed under protest, income tax returns for 1933 and 1934, claiming exemption. (R. 82–83.)

Petitioner's income from Club operations for 1933 and 1934 totalled $48,159.37 and $43,762.94, respectively, while its income from major tournaments amounted to $43,764.64 and $30,121.99, respectively, for the two years. Its Club operations (exclusive of major tournaments) resulted in losses for the two years, but from all of its operations the petitioner had, after adjustments by the Commissioner for excessive depreciation, net incomes of

$21,693.84 and $6,330.47 for the years 1933 and 1934, respectively. Upon these net incomes, the Commissioner determined deficiencies and imposed 25 percent penalties for late filing of the returns, (R. 6–11, 65, 68, 79–80.)

The Board of Tax Appeals held that petitioner had failed to establish its right to exemption and that therefore its income, including fees and dues, was subject to tax; the Board also concluded that petitioner had not established reasonable cause for its delay in filing returns and sustained the imposition of the penalties. (R. 83–90.) The decision of the Board was affirmed by the court below. (R. 106–110.)

ARGUMENT

The court below determined, after careful analysis of the particular circumstances shown by the record, that the operation of the tennis tournaments by West Side Club was not incidental to its normal activities conducted for the pleasure and recreation of its members but, on the contrary, was a discrete business activity, producing sizeable, recurrent profits derived from outsiders and having only an indirect relation to the recreational objects of the club (R. 108–109). In its decision the court specifically recognized that a club, without losing its exempt status, may carry on a profitable activity within its own organization, see *Trinidad* v. *Sagrada Orden,* 263 U. S. 578, and may profitably lease or sell part of its property if the profits derived

are either non-recurrent or incidental to its purposes, see *Trinidad* v. *Sagrada Orden, supra; Santee Club* v. *White,* 87 F. (2d) 5 (C. C. A. 1st); *Koon Kreek Klub* v. *Thomas,* 108 F. (2d) 616 (C. C. A. 5th). It concluded, however, that the case at hand presents a materially different situation. Upon its view of the facts, which agreed with that taken by the Board (R. 87–88), the court below, we submit, was clearly correct in its decision that West Side Club had not shown either that it was "operated exclusively for pleasure, recreation, and other nonprofitable purposes" or that no part of its net earnings "inured to the benefit of any private shareholder". Accord: *Jockey Club* v. *Helvering,* 76 F. (2d) 597 (C. C. A. 2d).

1. The cases cited by petitioner (Pet. 7–13), in an attempt to show a conflict, are plainly distinguishable on their facts, and the court below so stated (R. 109). In *Trinidad* v. *Sagrada Orden, supra,* at 579, 580, 582, the taxpayer claiming an exemption was organized, and devoted its entire income derived from rents (and, in small part, from sales of "wine, chocolate and other articles" to its own members "for uses * * * purely incidental" to its work and not for "financial gain"), exclusively for religious, charitable and educational purposes, and its members, who had taken the vow of poverty, owned no interest whatever in any of its properties, either upon dissolution or otherwise. There was thus substantial reason in that

case, as there clearly is not here, to hold that the income-producing activities were incidental to the taxpayer's normal activities and did not inure to the benefit of its members. The Fifth Circuit in *Koon Kreek Klub* v. *Thomas, supra,* at 617–618, concluded that "whatever financial gain was realized [by the taxpayer] was incident to and directed toward the accomplishment of the purposes upon which the exemption is based." Obviously, such a determination depends upon an examination of all the circumstances arising in the particular case; since the Second Circuit in the case at hand took a materially different view of the facts, there plainly is no conflict of decisions. It may be observed, in addition, that the pivotal issue, whether a certain activity is incidental to the objects of a particular club, is of no general importance. Compare *Santee Club* v. *White, supra,* at 8.

2. Since petitioner is not an exempt organization but is taxable as a corporation, as explained above, its dues and initiation fees necessarily constitute a part of the income derived from its operations. There is no conflict of decisions on this question;[1] nor is it, as suggested (Pet. 12), one of general importance.

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[1] Petitioner has found not a single circuit or district court decision upon which to base a claim of conflict; the two Board cases upon which it relies (Pet. 12) raise an entirely different question. See *Valley Waste Disposal Co.* v. *Commissioner*, 38 B. T. A. 452; *Board of Fire Underwriters of*

3. Petitioner does not dispute the proposition that, in order to avoid the penalty for delinquency, the burden was on it to establish reasonable cause for its delay in filing its returns. *Sabatini* v. *Commissioner,* 98 F. (2d) 753, 756 (C. C. A. 2d). Both the Board (R. 89–90) and the court below (R. 110) concluded, in view of the particular circumstances, that no such reasonable cause had been shown. See *Sabatini* v. *Commissioner, supra; American Milk Products Corporation* v. *United States,* 41 F. (2d) 966 (C. Cls.); *Pioneer Automobile Service Co.* v. *Commissioner,* 36 B. T. A. 213; *Groves* v. *Commissioner,* 38 B. T. A. 727. There is manifestly no conflict on this point, as urged (Pet. 13), with *Jockey Club* v. *Helvering, supra.* The taxpayer there filed blank returns within the time allowed (see 30 B. T. A. 670; R. 90); moreover, there the point was not raised before or considered by the Circuit Court of Appeals when it affirmed (76 F. (2d) 597).

Duluth v. *Commissioner*, 26 B. T. A. 860. There the issue was whether a non-profit organization which received and disbursed amounts solely as agent for others, without charge, should be taxed as in receipt of income to the extent of any temporary excess of receipts over disbursements. The case at hand more nearly resembles *Pontiac Employees Mutual Benefit Association* v. *Commissioner*, 15 B. T. A. 74, and *Employes' Benefit Assn. of Amer. Steel Foundries* v. *Commissioner*, 14 B. T. A. 1166, in which the Board held that dues received by non-exempt mutual benefit associations of employees were taxable as income.

CONCLUSION

The decision of the court below correctly applies the statute and the governing principles to the facts of the case. There is no conflict of decisions, and no question of general importance is presented. The petition should therefore be denied.

Respectfully submitted.

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